



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 966**

**[Doc. No. AMS-SC-20-0004; SC20-966-1 PR]**

**Tomatoes Grown in Florida; Modification of Handling Requirements**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule invites comment on recommendations from the Florida Tomato Committee (Committee) to change the handling requirements in the Marketing Order regulating the handling of tomatoes grown in Florida. This action would revise the exemption, container, and definition sections under the handling requirements and would update language to reflect current industry practices.

**DATES:** Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-

0237; Fax: (202) 720-8938; or Internet:

<http://www.regulations.gov>. All comments should reference the document number and the date and page number of this issue of the *Federal Register* and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at:

<http://www.regulations.gov>. All comments submitted in response to this proposal will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Steven W. Kauffman, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863)324-3375, Fax: (863) 291-8614, or Email: [Steven.Kauffman@usda.gov](mailto:Steven.Kauffman@usda.gov) or [Christian.Nissen@usda.gov](mailto:Christian.Nissen@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington,

DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or E-mail: Richard.Lower@usda.gov.

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, proposes an amendment to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Agreement No. 125 and Order No. 966, as amended (7 CFR part 966), regulating the handling of tomatoes grown in Florida. Part 966 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Committee locally administers the Order and is comprised of producers operating within the production area.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this proposed rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance

Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' " (February 2, 2017).

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to a marketing order may file with USDA a petition stating that the marketing order, any provision of the marketing order, or any obligation imposed in connection with the marketing order is not in accordance with law and request a modification of the marketing order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States (U.S.) in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule invites comments on revising the exemption, container, and definition sections in the handling requirements of the Order. The Committee believes implementing the recommended changes would allow the tomato industry to meet its domestic market needs for quality, stabilize returns to producers, and bring the handling requirements in line with current industry practices. The Committee unanimously recommended these changes at its meeting on November 12, 2019.

Section 966.5 defines "tomatoes" to include all varieties of the edible fruit (*Lycopersicon esculentum*) commonly known as tomatoes and grown within the production area. Section 966.52 provides authority to the Committee to establish handling requirements for tomatoes grown within the regulated area. This includes, in part, establishing grade, size, quality, and maturity requirements, as well as weight, capacity, dimensions, markings, and pack requirements, which may be used in the handling of tomatoes. Section 966.60 requires Florida tomatoes be inspected and certified by authorized representatives of the Federal or Federal-State Inspection

Service (FSIS), or such other inspection service as the Secretary shall designate.

Section 966.323 sets forth the handling requirements for Florida tomatoes, specifying the grade, size, and container requirements, including definitions and exemptions. The handling requirements also establish packout reporting requirements.

The Committee met on August 21, October 2, and November 12, 2019, to examine and discuss updates to the handling requirements. The Committee considered the major changes in the Florida tomato industry, including the types of tomatoes produced, production methods, and the container applications used at the handling operations. Following these discussions, the Committee's recommendations were to: remove the exemption for pear shaped or Roma type tomatoes, revise the exemption and definition sections for greenhouse and hydroponic tomatoes, adjust the pack and container requirements, and update language to reflect current industry practices.

Over the last twenty years, the varieties of tomatoes produced in Florida for the fresh market have changed. When the handling requirements were created, Florida

production of Roma tomatoes were a smaller portion of the fresh market and other varieties like Grape tomatoes were not yet developed. In recent years the production of Roma tomatoes has grown and is now a significantly larger portion of fresh market sales.

The average volume of fresh Florida Roma tomato shipments from the last three seasons reported by USDA Market News is 7,324,400 25-pound containers. This number is consistent with the Committee estimates of fresh market Roma tomatoes handled in the production area. The average volume reported by USDA Market News over the three-year period from 1999 to 2001 is 6,217,200 25-pound containers.

During the twenty-year period from 1999 to 2019, the total volume of regulated round tomatoes in Florida has decreased by half. According to USDA Market News shipping point data, total Florida production has decreased from approximately 60 million 25-pound containers for the 1999-20 season to 30 million for the 2018-19 season. Roma tomatoes have an increased market share representing nearly a quarter of the total tomato volume produced in the production area.

Further, according to the Global Agricultural Trade System (GATS) and Committee data, imports of Roma tomatoes from Mexico has quadrupled from approximately 12 million in 1999 to 48 million 25-pound containers in 2019. Over this 20-year period, based on USDA Market News and Committee reports, total U.S. fresh round tomato shipments from Florida and imported from Mexico [during the regulated period] decreased from approximately 92 million to 76 million 25-pound containers while U.S. Roma shipments increased from approximately 18 million to 52 million 25-pound containers.

These shipment numbers indicate Roma production as a percentage of the entire fresh tomato market in the U.S. has increased dramatically. This trend is demonstrated in taking the change between the 1999-2000 and 2018-2019 seasonal volume of Roma tomatoes as a percentage of total production for comparison. The proportion of Roma tomatoes as a percentage of total tomato shipments from both Florida and Mexico has increased from 19.6 percent (18 million divided by 92 million X 100) to 68.4 percent (52 million divided by 76 million x 100) during the regulated months. The increase in Roma volume and its proportion of the U.S.



fresh market has impacted the Florida industry and the U.S. tomato market.

When Roma tomatoes were first exempt from the handling requirements, they were a niche market item and represented a minor portion of sales. With Roma production representing an increasing share of Florida tomato production, and a growing share of the domestic tomato market, the Committee discussed removing the handling requirements exemption for Roma tomatoes and requiring them to meet same grade and maturity requirements as round tomatoes.

Committee members indicated that Roma tomatoes can have quality defects such as puffing and scars. The puffing makes the Roma tomato soft and scars are not favorable to consumers in the marketplace. Since these quality factors were not regulated, there were concerns the quality factors were negatively affecting the returns on Roma varieties as well as other fresh market varieties. The Committee recognized the benefits of having the existing grade and maturity requirements for round tomatoes and agreed that establishing requirements for Roma tomatoes would help improve quality and help stabilize returns to

the industry's producers by keeping low quality tomatoes out of the fresh market.

Consequently, the Committee unanimously recommended removing the exemptions for Roma tomatoes except the size requirements. The Committee recommended leaving the size exemption in place for Roma tomatoes since they are naturally smaller than round varieties, which makes it difficult for them to meet the existing size requirements. Handlers of Roma varieties are not currently required to register with the Committee or pay assessments on Roma varieties shipped, since they are exempt from requirements in the Order. With this proposed change, Roma tomatoes would be subject to grade, pack and container, inspection, and reporting requirements, and handlers would be subject to paying assessment fees.

Committee members and FSIS stated they are not aware of any Florida handlers that only handle Roma tomatoes. Members did indicate it is possible that some producers are only producing Roma tomatoes and that some small operations may be shipping Roma varieties inside the regulated area. The Committee estimates that handlers currently registered with the Committee are handling 90 to 95 percent of the

Roma volume produced in the production area. Further, as registered handlers, they are familiar with the inspection, assessment, and reporting requirements established in the Order. Thus, handlers should be well-positioned to accommodate this change.

The Committee also discussed the growth in alternative production methods, especially in the area of protected culture production. Protected culture production is now more prevalent, sophisticated, and diverse than it was ten years ago, and includes the use of shade structures and other types of portable structures for use with field production. While most Florida growers still produce in an open-field environment, there has been some movement toward protected culture production in both high and low technology structures within the production area.

Currently, greenhouse and hydroponic production are exempt from the handling requirements. The regulations define "greenhouse tomatoes" as tomatoes grown indoors. With more producers considering the use of protected culture production and other production technologies, there have been questions as to what meets the definition of greenhouse. Committee members agreed it was important to

provide the industry with more clarity regarding this exemption, so producers are clear about which production types are exempt from the handling requirements.

Protected culture tomato production can include rudimentary shade cloth and tunnel structures, to more sophisticated shade houses, to high-tech greenhouses and hothouses. Shade-house production often utilizes structures placed in the open field environment in order to protect the plants from adverse weather conditions, and the structures are often portable in nature. Greenhouse and hydroponic production usually mean permanent structures built of glass or similar materials that provide a controlled environment. The costs and the environmental factors that affect production are also vastly different between a controlled environment verses a shade-house operation in the field.

Greenhouse and hydroponic tomatoes have been exempted from the handling requirements given that their cost of production, growing conditions, and market segment were historically different compared to field-grown tomatoes. However, there are some products in the national market grown in covered production, particularly those grown in

lower technology shade houses, which may compete directly with tomatoes Florida growers produce in the open field. As such, the Committee believes it is important to be more precise in what production practices warrant an exemption.

With the increase in shade-house and other in- field technologies competing with field grown tomatoes for markets at similar price points, the Committee determined the exemption definition should be adjusted to better reflect the growing conditions that are significantly different than an open-field environment and production methods utilized in the production area. Committee members agreed that shade-house and similar production methods should not be granted an exemption since these methods of production do not significantly differ from that of open-field production. Further, these types of technologies are being used within the production area. Conversely, Committee staff has identified only one producer using permanent greenhouse structures in the production area.

As such, the Committee recommended revising the exemption and definition paragraphs of the handling requirements pertaining to greenhouse and hydroponic tomatoes to better define what types of production methods

are exempt. This action would eliminate the current exemptions for greenhouse and hydroponic production and would establish a new exemption and definition for controlled environment production.

The new definition would define "controlled environment" to mean tomatoes grown in a soilless medium, in above ground containers, using hydroponic methods within a fully-enclosed permanent aluminum or fixed steel structure clad in glass, impermeable plastic, or polycarbonate, using automated irrigation and climate control, and with the surface dirt completely concealed under concrete or a synthetic lining (e.g. polypropylene ground cover). Tomatoes produced in a structure meeting the requirements of controlled environment would remain exempt from the handling requirements. The controlled environment definition was developed with input from the production area greenhouse and hydroponic producer. The Committee expects greenhouse and hydroponic operations in the production area currently exempt to meet the proposed definition of "controlled environment." The proposed definition would provide producers with better clarity on

which production types would meet the exemption requirements.

The Committee also recommended clarifying the exempt types of tomatoes under the handling requirements by adding tomatoes-on-the-vine or cluster type tomatoes (TOV), Campari (cocktail), and grape tomatoes. These varieties were not a large portion of the market when the handling requirements were last updated, but now are produced by growers in the production area. Like cherry tomatoes, which already have a specific exemption, these varieties are specialty varieties, and the Committee was not interested in regulating these varieties at this time. This change would clarify that these varieties are exempt from Order requirements, along with cherry tomatoes.

The Committee also recommended modifying the exemption relating to net weight requirements to better reflect current industry practices. Specialty packed, yellow meated, and place packed tomatoes are currently exempt from the net weight and the weight marking requirements of the handling regulations. In its discussions, the Committee recognized there has been considerable innovation over the last 10 years in packaging for retail sales. While most

retail packaging had been done by repackers, there has been an increase in such packaging by handlers. Several handlers now hand place tomatoes into single or two-layer containers known as place-packed. Some handlers also pack directly into sleeves, bags, and clamshells for retail-ready sales.

With this type of packaging, it is very difficult to pack to any set weight requirement as they are normally packed to a count rather than based on weight. Consequently, the Committee recommended adding language that would also exempt retail-ready packaging from the net weight and marking requirements. The Committee also recommended defining "retail-ready packaging" as tomatoes packed by a first handler into consumer packs (sleeves, bags, clamshells) of two pounds or less. The Committee also recommended removing the definition for "specialty packed red ripe tomatoes" as no one in the production area packs to meet that definition. The Committee believes these changes would make the regulations easier to understand and better reflect current market conditions.

In another industry change, it has become more common for handlers to use Reusable Plastic Containers (RPCs) for



packing tomatoes rather than corrugated cardboard containers. RPCs can be washed and sanitized for reuse and this makes them practical for packing at handling operations. Also, there are retailers that prefer to receive their tomatoes in RPCs. Additionally, the use of RPCs is more prevalent by those handlers packing Roma varieties that would also be required to meet container requirements under this action. However, RPCs and their use are not specifically included in the existing container requirements. As part of the recommended updates to the handling requirements, the Committee agreed that language regarding the use of RPCs should be added to the container requirements.

Committee members voted to revise the container requirements to include the use of RPCs along with language to ensure containers used are clean and sanitized prior to reuse. The Committee also recommended modifying the current container language that states containers in which the tomatoes are packed "must be clean and bright in appearance without marks, stains, or other evidence of previous use" to specifically apply to corrugated cardboard

containers, so use and guidance is provided for both RPCs and cardboard containers.

Finally, this proposed rule would also make several other changes to the handling requirements to update language and to reflect current industry practices. Such changes include adding or revising paragraph headings to provide additional clarity, including Roma type tomatoes under the packout reporting requirements, and updating contact information.

This action would revise the exemption, container, and definition sections in the handling requirements.

Implementing the recommended changes would allow the Florida tomato industry to meet its domestic market needs for quality, stabilize returns to producers and make the requirements more reflective of current industry practices.

Section 8e of the Act (7 U.S.C. 608e-1) provides that when certain domestically produced commodities, including tomatoes, are regulated under a Federal marketing order, imports of that commodity must meet the same or comparable grade, size, quality, and maturity requirements. Since this change would adjust the exemption requirements to require previously exempt tomatoes to meet grade and/or

size requirements, a corresponding change would need to be made to the import requirements for tomatoes. The corresponding changes to the import regulations are being addressed in a separate rulemaking.

### **Initial Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 50 producers of Florida tomatoes in the production area and 37 handlers subject to regulation by the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts less than \$1,000,000 and small

agricultural service firms are defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to industry and Committee data, the average annual price for fresh Florida tomatoes during the 2018-19 season was approximately \$12.56 per 25-pound container, and total fresh shipments were 25.9 million containers. Using the average price and shipment information, the number of handlers, and assuming a normal distribution, most handlers have average annual receipts of less than \$30,000,000, (\$12.56 times 25.9 million containers equals \$325,304,000 divided by 37 handlers equals \$8,792,000 per handler).

In addition, based on production data, an estimated producer price of \$6.00 per 25-pound container, the number of Florida tomato producers, and assuming a normal distribution, the average annual producer revenue is above \$1,000,000 (\$6.00 times 25.9 million containers equals \$155,400,000 divided by 50 producers equals \$3,108,000 per producer). Thus, most handlers of Florida tomatoes may be classified as small agricultural service firms while the majority of producers may be classified as large entities under the SBA definition.

This proposed rule invites comments on revising the exemption, container, and definition sections in the Order's handling requirements. Implementing the recommended changes to the handling requirements would allow the tomato industry to meet its domestic market needs for quality, stabilize returns to producers and would bring the handling requirements in line with current industry practices. The Committee unanimously approved this recommendation at its public meeting held on November 12, 2019. This rule would revise § 966.323 as authorized by §§ 966.5, 966.52, and 966.60 of the Order.

These proposed changes could result in some additional costs for the industry. This action would eliminate the exemption for Roma varieties, which would require handlers to pay assessments and meet inspection requirements on fresh Roma tomatoes shipped outside the regulated area. Consequently, for those handlers shipping Roma type tomatoes, this action would increase the assessment obligation and would mean additional inspection fees. The cost of inspection is \$0.029 for each 25-pound container as set by the State of Florida, and the current assessment rate is \$0.025 per 25-pound container. As both costs are

based on the volume of containers shipped, it is anticipated this action would increase the cost burden on both large and small handlers of Roma tomatoes proportionally.

According to USDA Market News data and Committee estimates, there are approximately 7.3 million 25-pound containers of fresh market Roma tomatoes handled each season in the production area. With the additional assessments from Roma tomatoes, the Committee would collect approximately \$182,500 ( $\$.025 \times 7,300,000$  25-pound containers) more in assessments annually. Collecting additional assessments on Roma tomatoes would represent an increase of 27 percent of last year's \$647,500 collected from handlers.

Additionally, handlers would be responsible for the cost of inspection on each 25-pound container of Roma type tomatoes. Using the Market News and Committee estimates above, handlers should expect to be responsible for an additional \$0.029 per 25-pound container equivalent handled. The estimated additional inspection cost to the entire industry would total \$211,700 ( $7,300,000 \times \$0.029$ ) in inspection fees charged annually.

Each handler who handles tomatoes grown in the production area must be certified as a registered handler by the Committee in order to ship tomatoes outside of the regulated area. Committee members and FSIS indicated that they were not aware of any handlers that only handled Roma varieties of tomatoes. When considering the approximate Roma volume of 7.3 million 25-pound containers, it is estimated that the handlers already registered with the Committee are handling 90 to 95 percent of the Roma volume in the Order's production area. Therefore, most handlers that are shipping Roma tomatoes should already be registered with the Committee. These handlers are familiar with the inspection, assessment, and reporting requirements established in the Order. Thus, handlers should be well-positioned to accommodate this change.

Aside from the exemption change for Roma type tomatoes, it is not anticipated that the other changes to the exemption, container, and definition paragraphs would result in any additional cost, as most of these changes were recommended to align the requirements with current industry practices. Regarding the change in the exemptions for greenhouse and hydroponic production, the Committee

worked to ensure that production area producers that were utilizing these exemptions would meet the new exemption requirements for controlled environment, so this change would not represent any additional costs for producers in the production area.

It is not anticipated that this action would impose an additional reporting burden on handlers. The FSIS reports the volume inspected to the Committee, and all Roma inspections and reporting criteria would be reported on existing forms. Handlers are familiar with the reporting requirements and would just be reporting additional volume on existing forms. Consequently, this should not result in more than minimal additional costs.

In addition to the potential costs, this change would also provide benefits to the overall industry. Roma tomatoes can have difficulty with certain quality requirements, which can have a negative impact on grower returns. Given the increased importance of Roma type tomatoes in the marketplace, establishing grade and maturity requirements for Roma type tomatoes would have a stabilizing effect on the market for Roma tomatoes and help increase returns to handlers and producers. The additional



revenue to the Committee should help with marketing, research, and education efforts. Thus, the additional costs for inspection and assessment should be offset by the benefits of this action. The benefits of this action are expected to be equally available to tomato producers and handlers, regardless of their size.

The Committee considered alternatives to these proposed changes. Prior to this recommendation, the Committee discussed not providing any exemptions for greenhouse or hydroponic production operations in the handling requirements. However, after determining there is limited greenhouse production in the production area, the Committee agreed providing an exemption for growers that meet the new definition for controlled environment would best serve the industry. The Committee also considered establishing grade and maturity requirements for grape tomatoes, but members determined they are not interested in regulating these tomatoes at this time. The Committee considered continuing the exemption for Roma tomatoes, but after considering the proportion of the market that Roma tomatoes now represents, the Committee decided that regulating Roma varieties would benefit the industry. The

Committee also considered not adding an additional paragraph to address RPCs, but with the use of RPCs becoming more common, it was determined container language should be updated to better reflect current industry practices. Therefore, the alternatives were rejected.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0178 Vegetable and Specialty Crops. No changes are necessary in those requirements as a result of this proposed action. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large Florida tomato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities

for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

The Committee's meetings were widely publicized throughout the Florida tomato industry, and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the August 21, October 2, and November 12, 2019, meetings were public meetings, and all entities, both large and small, were able to express their views on these issues. Interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this proposed action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <http://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the

previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

#### **List of Subjects in 7 CFR Part 966**

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

For the reasons set forth in the preamble, the Agriculture Marketing Services proposes to amend 7 CFR part 966 as follows:

#### **PART 966 - TOMATOES GROWN IN FLORIDA**

1. The authority citation for 7 CFR part 966 continues to read as follows:

Authority: 7 U.S.C. 601-674.

2. Amend § 966.323 by:

- a. Revising the section heading;
- b. Revising paragraph (a) (3) (iii);
- c. Adding paragraph (a) (3) (iv);
- d. Revising paragraphs (d), (e) and (g).

The revisions and additions read as follows:

**§ 966.323 Handling Requirements.**

\* \* \* \* \*

(a) \* \* \*

(3) \* \* \*

(iii) The cardboard container in which the tomatoes are packed must be clean and bright in appearance without marks, stains, or other evidence of previous use.

(iv) The Reusable Plastic Containers (RPCs) in which the tomatoes are packed must be cleaned and sanitized prior to use.

\* \* \* \* \*

(d) *Exemptions*

(1) *For types.* The following types of tomatoes are exempt from these requirements:

(i) Cherry tomatoes;

(ii) Grape tomatoes;

(iii) Cocktail-type tomatoes commonly referred to as Campari tomatoes;

(iv) Tomatoes-on-the-vine, also known as Cluster tomatoes or TOVs.

(2) *For plum tomato types commonly referred to as Roma tomatoes.* Roma tomatoes must meet the requirements of this section, except they are exempt from the size requirements specified in paragraph (a)(2) of this section.

(3) *For yellow meated tomatoes.* Yellow meated tomatoes are exempt from the container net weight requirements specified in paragraph (a)(3)(i) of this section, and the requirement that each container or lid shall be marked to indicate the designated net weight as specified in paragraph (a)(3)(ii) of this section, but must meet the other requirements of this section.

(4) *For special packed tomatoes.* Single layer and two layer place packed tomatoes, and tomatoes packed in retail-ready packaging, are exempt from the container net weight requirements specified in paragraph (a)(3)(i) of this section, and the requirement that each container or lid shall be marked to indicate the designated net weight as specified in paragraph (a)(3)(ii) of this section, but must meet the other requirements of this section.

(5) *For growing environment.* Tomatoes grown in a controlled environment are exempt from the requirements in this section.

(6) *For field-packed tomatoes.* Producer field-packed tomatoes must meet all of the requirements of this section except for the requirement that all containers must be packed at registered handler facilities as specified in paragraph (a)(3)(ii) of this section, and the requirement that such tomatoes designated as size 6 × 6 must meet the maximum diameter requirement specified in paragraph (a)(2)(i) of this section: *Provided*, That 6 × 6 and larger is used to indicate the listed size designation on containers.

(7) *For minimum quantity.* Each person subject to the Order may handle up to but not to exceed 50 pounds of tomatoes per day without regard to the requirements of this section, but this exemption shall not apply to any shipment or any portion thereof of over 50 pounds of tomatoes.

(8) *For repacked tomatoes.* Tomatoes that met the inspection requirements of paragraph (a)(4) of this section which are resorted, regraded, and repacked by a handler who has been designated as a "Certified Tomato Repacker" by the committee are exempt from:

(i) The tomato grade classifications of paragraph (a)(1) of this section;

(ii) The size classifications of paragraph (a) (2) of this section, except that the tomatoes shall be at least 2-9/32 inches in diameter; and

(iii) The container weight requirements of paragraph (a) (3) of this section.

(9) *For adverse growing conditions.* Upon recommendation of the committee, tomatoes that are elongated or otherwise misshapen due to adverse growing conditions may be exempted by the Secretary from the provisions of paragraph (a) (2) of this section.

(10) *For UglyRipe<sup>TM</sup> and Vintage Ripes<sup>TM</sup> tomatoes.* UglyRipe<sup>TM</sup> and Vintage Ripes<sup>TM</sup> tomatoes must meet all the requirements of this section: *Provided, That* UglyRipe<sup>TM</sup> and Vintage Ripes<sup>TM</sup> tomatoes shall be graded and at least meet the requirements specified for U.S. No. 2 under the U.S. Standards for Grades of Fresh Tomatoes, except they are exempt from the requirements that they be reasonably well formed and not more than slightly rough, and *Provided, Further that* the UglyRipe<sup>TM</sup> and Vintage Ripes<sup>TM</sup> tomatoes meet the requirements of the Identity Preservation program, Specialty Crops Inspection Division, Specialty Crops Program, AMS, USDA.



(e) *Report of packouts.* Each registered handler shall, at the end of each day handling activities have been conducted, or the following morning as the committee may prescribe, provide to the committee or its designated agent a complete and accurate accounting of the number of containers of non-exempt tomatoes packed that day. The report shall include an accounting of the tomato type (e.g. Round, Roma), grade, size, maturity, and net weight of the containers packed in each category. The total packout report shall be provided to the committee or its authorized agent in a timely fashion that allows the committee to compile a daily, industry-wide packout report.

\* \* \* \* \*

(g) *Definitions.*

*Certified Tomato Repacker* means a repacker of tomatoes in the regulated area that has the facilities for handling, regrading, resorting, and repacking tomatoes into consumer sized packages and has been certified as such by the committee.

*Controlled environment* means tomatoes grown in a soilless medium, in above ground containers, using hydroponic methods within a fully-enclosed permanent

aluminum or fixed steel structure clad in glass, impermeable plastic, or polycarbonate, using automated irrigation and climate control, and with the surface dirt completely concealed under concrete or a synthetic lining (e.g., polypropylene ground cover).

*Pickling* as used in §§ 966.120 and 966.323 means to preserve tomatoes in a brine or vinegar solution.

*Processing* as used in §§ 966.120 and 966.323 means the manufacture of any tomato product that has been converted into juice, or preserved by any commercial process, including canning, dehydrating, drying, and the addition of chemical substances. Further, all processing procedures must result in a product that does not require refrigeration until opened.

*Producer field-packed tomatoes* means tomatoes that at the time of inspection are #3 color or higher (according to color classification requirements in the U.S. tomato standards), that are picked and place-packed in new containers in the field by a producer as defined in § 966.150 and transferred to a registered handler's facilities for final preparation for market.

*Retail-ready packaging* means tomatoes packed by a first handler into consumer packs (e.g., sleeves, bags, clamshells) of two pounds or less.

*U.S. tomato standards* means the revised United States Standards for Fresh Tomatoes (7 CFR 51.1855 through 51.1877) effective October 1, 1991, as amended, or variations thereof specified in this section, provided that § 51.1863 shall not apply to tomatoes covered by this part. Other terms in this section shall have the same meaning as when used in this part and the U.S. tomato standards.

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**Bruce Summers,**

*Administrator,*

*Agricultural Marketing Service.*

[FR Doc. 2020-12183 Filed: 6/8/2020 8:45 am; Publication Date: 6/9/2020]